In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-293

EZRA KULKO,
Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO;
SHARON KULKO HORN,
Appellees.

On Appeal from the Supreme Court of the State of California

BRIEF FOR APPELLANT

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OPINIONS BELOW

The opinion of the Supreme Court of the State of California (J.S. App. A) is reported at 19 Cal.3d 514, 138 Cal.Rptr. 586.

The opinion of the California Supreme Court vacated the opinion of the Court of Appeal, First Appellate District of the State of California (J.S. App. B), reported at 133 Cal.Rptr. 627.

JURISDICTION

The judgment of the California Supreme Court was entered on May 26, 1977 (J.S. App. A). By California law it became final on June 25, 1977.[1] Calif. Rules of Court Rule 24(a). Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

The California Supreme Court is the highest state court in which decision in this case could be had. In its decision, the Court held that Appellant is subject to *in personam* jurisdiction in the state of California (J.S. App. A, xi, xiii) and that such exercise of jurisdiction does not exceed the boundaries established by the United States Constitution (J.S. App. A, v-vi).

The validity of California's Long-Arm Statute (C.C.P. §410.10) as applied to the facts of this case, is drawn into question on the ground that its application in this case is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The California Supreme Court specifically upheld the validity of this application (J.S. App. A, xi, xii).

There has been timely and explicit insistence in all levels of the California state courts that this statute, as applied, is repugnant to the Federal Constitution and raises a substantial federal question. *Charleston Federal Savings & Loan Assoc. v. Alderson* (1945) 324 U.S. 182, 185; *Cohen v. California* (1971) 403 U.S. 15, 18.

[1]Rule 24, California Rules of Court, states in pertinent part: "A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days." West's California Rules of Court 1977.

The requirement of 28 U.S.C. §1257 (2) that the lower court hold in favor of the validity of the statute is satisfied when the state court holds the statute applicable to the particular set of facts against appellant's assertion that such application is invalid as repugnant to the constitution. *Dahnke-Walker Milling Co. v. Bondurant* (1921) 257 U.S. 282.

From the first instance when an attempt was made to subject Appellant to California jurisdiction, he has urged that this application of the statute is invalid. The basis for the contention is that the statute is limited by the United States Constitution and this application exceeds those limits because Appellant does not have the requisite minimum contacts to satisfy the constitutional due process requirement as set forth in *International Shoe Co. v. Washington* (1945) 326 U.S. 310, *McGee v. International Life Insurance Co.* (1957) 355 U.S. 220, *Hanson v. Denckla* (1958) 357 U.S. 235.

On the basis of the California Supreme Court decision upholding jurisdiction, the California Superior Court for the City and County of San Francisco modified the divorce decree of the parties by awarding increased child support to the mother. (See attached Appendix.) Appellant has not been able to appear and defend on the merits without admitting jurisdiction under C.C.P. §410.10. Therefore, it can be seen that the underlying litigation between Appellant and Real Party in Interest involves two aspects: (1) modifica-

tion of child support and (2) jurisdiction. The former has not been pursued to final judgment; once jurisdiction has been assumed, it is retained by the court until the child reaches majority, is married or otherwise emancipated.[2] However, the jurisdiction question has reached final judgment in the highest state court.

The issue presented here, whether or not jurisdiction offends traditional notions of substantial justice and fair play, is entirely distinct from the merits of the modification proceeding. *Clark v. Williard* (1934) 292 U.S. 112, 117-119. In spite of the fact that the modification proceedings are not final, it is critical that this court review the jurisdictional aspect of the case at this time for two reasons: (1) the Appellant has not made a general appearance in California, thus all proceedings have been conducted without a defense on the merits; and (2) the trial court modification is itself invalid without the grant of jurisdiction which is herein contested.

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded

[2]California Civil Code §4700 states in pertinent part:
"(a) In any proceeding where there is at issue the support of the minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child. • • • Any order for child support may be modified or revoked as the court may deem necessary, . . . (b) When a court orders a person to make specified payments for support of a child during the child's minority, or until such child is married or otherwise emancipated, the liability of such person terminates upon the happening of such contingency." West's Ann. Civ. Code §4700 (1977 Supp.)

and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. §2103.

QUESTIONS PRESENTED

Whether, within the limitations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Appellant, a New York father of children residing in California, has by acquiescing to the desire of his children to live in California, rendered himself amenable to proceedings in the California Courts to modify the amount of child support he must pay.

Whether, within the limitations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the State of California can interpret its Long-Arm Statute, C.C.P. §410.10, to encompass a parent's acts in a foreign state which determine his child's future place of residence, as the type of acts which create an effect within the state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 410.10 of the California Code of Civil Procedure (West's Ann. C.C.P. §410.10 (1973 ed.)) provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

The Fourteenth Amendment to the United States Constitution (U.S.C.A. Const. Amend. XIV §1 (1972 ed.)) provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

Introduction

The problems giving rise to this litigation occurred approximately one year after a Decree of Divorce was obtained between the parties. These difficulties commenced when Real Party in Interest, Sharon Kulko Horn invited and/or induced the parties' two children to remain with her in California instead of returning to Appellant in New York after a Christmas vacation visitation in December, 1973.

After protests by Appellant, the children were returned to his custody in January, 1974. At that time, the daughter, Ilsa, promptly expressed a desire to return to the mother in California. Appellant acquiesced to her wishes to the extent he purchased for her a one-way airline ticket to California. For the next two years both parties accepted the split custody arrangement, the son Darwin, living with Appellant in New York, and the daughter, Ilsa, living with Real Party in Interest in California. Each child spent visitation time with the opposite parent in that parent's state of residence.

In January, 1976, the son requested and received air fare from Real Party in Interest and departed from New York to live in California with his mother without informing Appellant.

No legal steps, aside from the original decree of divorce, were taken by either party until the instant proceedings.

Summary of Proceedings and Judgments Below

The parties, EZRA KULKO, Appellant, and SHARON KULKO HORN, Real Party in Interest, as well as their two children, Darwin, born June 23, 1961, and Ilsa, born July 10, 1962, were domiciliaries of New York until the separation between the parties in March, 1972, at which time Sharon left the family home and eventually moved to California. The children remained with their father.

The parties were married in California on July 29, 1959. Dr. Kulko arrived in California on July 29, 1959, en route from his post in Fort Sam Houston to Korea, his new duty station with the United States Armed Forces. By pre-arrangement, Mrs. Horn came to California from New York for the marriage ceremony. Dr. Kulko departed for Korea on August 2, 1959, and Mrs. Horn returned to her home in New York.

Dr. Kulko's only other contact with California occurred on August 13 and 14, 1960, when he had a one night stop-over in California, incident to his being transported from Korea to New York as part of his military service.

Both parties were domiciliaries of New York at the time of the marriage. Appellant is now, and has always been, a domiciliary of New York.

On September 19, 1972, in New York, the parties executed a separation agreement (App. 8-12), prepared by New York counsel retained by Mrs. Horn. Appellant did not have legal counsel. Mrs. Horn then flew to Haiti where she obtained a decree of divorce on September 25, 1972 (App. 13-15) by consent. The separation agreement (App. 8-12) was incorporated into the decree. Mrs. Horn immediately returned to California.

The agreement provided for the children to remain in Dr. Kulko's custody during the school year and in Mrs. Horn's custody during the summer months and for a week at Christmas and Easter vacations (App. 9-10). Dr. Kulko was to pay for their clothing, schooling, and all medical, hospital and dental expenses (App. 10).

In January, 1974, Ilsa was induced by her mother to move to California (App. 29). This was contrary to Dr. Kulko's wishes, but believing opposition would be detrimental to the family relationship, he acquiesced and purchased her a one-way airline ticket to California. Since that time, Ilsa has spent the summers of 1974 and 1975 with her father in New York. Mrs. Horn's affidavit denies this version, but states that Ilsa told her father in December of 1973, before she left for Christmas vacation that she wished to live in California and it was at that time that Dr. Kulko purchased the one-way ticket (App. 32).

Two years later, on or about January 10, 1976, Darwin called his mother in Californa, and requested to come to California to live (App. 32). Mrs. Horn sent a plane ticket which Darwin picked up at TWA and then proceeded to California (App. 29, 30, 32).

On January 12, 1976, when Darwin left home in the morning, Dr. Kulko understood that the child was on his way to school (App. 30); he was notified, after the fact, that Darwin was in California (App. 30, 33).

On February 5, 1976, Mrs. Horn commenced the underlying action to establish the Haitian decree as a California judgment and requested modification for custody of both children, for increased child support, and for a temporary restraining order to prevent the children's removal by Appellant from her home or the state of California (App. 3-8). Dr. Kulko was personally served in New York on February 23, 1976 (App. 18-19). On April 1, 1977, a notice of motion to quash service of summons for lack of personal jurisdiction (App. 20) was filed. The motion was denied May 17, 1976.

On June 16, 1976, Appellant petitioned the California Court of Appeal for a writ of mandate compelling the respondent court to quash service of summons for the reason that Appellant did not have the requisite minimum contacts with the state of California to meet the due process requirements of the United States Constitution (App. 34-39). An alternative writ of mandate issued ordering the Re-

spondent Court to quash the summons or show cause on or before September 2, 1976, why it had not.

In an opinion filed October 8, 1976, the Court of Appeal denied the peremptory writ and discharged the alternative writ of mandate stating that if Dr. Kulko had consented to the children taking up residence in California, such conduct was clearly an act causing an effect within the state. This being one of the bases for jurisdiction set out by the Restatement[3] and in essence incorporated into the statute (J.S. App. B. xx-xxi) whose application is questioned, there was no offense to the United States Constitution's due process requirement by the exercise of jurisdiction.

The matter was taken to the California Supreme Court by Petition for Hearing filed November 17, 1977. The California Supreme Court rendered its decision on May 26, 1977. The majority of the Court held that an effect in the forum state is the basis for jurisdiction over a nonresident who caused that effect by his out-of-state action (J.S. App. A, xi, xiii). Justice Richardson authored the dissenting opinion in which Justice Clark concurred. This opinion pointed out that there was no purposeful conduct which could reasonably be said to invoke the benefits and protections of California laws, and thus no base on which to ground *in personam* jurisdiction. It concluded that there were insufficient contacts with California to justify the exercise of personal jurisdition (J.S. App. A, xiii-xviii).

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[3]Restatement of Conflicts of Laws 2d §37.

On August 8, 1977, Real Party in Interest served a Notice of Motion to Set Arrearages and to Increase Child Support; Appellant filed a Notice of Motion to Continue Hearing (by special appearance only) pending the determination of the question by the United States Supreme Court of whether California has *in personam* jurisdiction over him. The Respondent Court, however, proceeded with the hearing and made an order increasing child support, awarding attorneys' fees, and determining arrearages. (Attached appendix.)

Appellant's Application To Stay Enforcement of that order was denied by this Court. There is a continuing threat of attempt by Real Party to enforce the order made by the Respondent Court on September 8, 1977, under the full faith and credit doctrine in the State of New York.

ARGUMENT

I

THE INSTANT DECISION ATTEMPTS TO IMPAIR FUNDAMENTAL PERSONAL LIBERTIES OF A NONRESIDENT

The recent decision rendered by this Court in *Shaffer v. Heitner* (1977) ..... U.S. ....., 97 S.Ct. 2569, 53 L.Ed.2d 683, reviewed the soundness and conceptual structure founded on the century-old case of *Pennoyer v. Neff* (1877) 95 U.S. 714. In this respect, the Court stated at page 694 that:

> "From our prospective, the importance of *Pennoyer* is not its result but the fact that its prin-

ciples, and corollaries derived from them, became the basic elements of the constitutional doctrine governing state court jurisdiction."

These principles were likewise reviewed by this Court in its decision in *Hanson v. Denckla* (1958) 357 U.S. 235. In this respect the Court pointed out at 249-250 as follows:

> "Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum state was thought to be an absolute nullity, but the matter remained a question of state law over which this Court exercised no authority. With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the Court had not acquired *in personam* jurisdiction was void within the State as well as without. *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565."

In that case, the Court went on to state at page 251 that:

> "the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt,* 354 U.S. 416, 418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states."

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon a personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock* (1959) 361 U.S. 516, 524.

The thrust and impact of this California decision is to intrude into the intricate and sensitive fabric of family relations so as to interfere with the legitimate and desirable right of parents to work out the details of child rearing by non-legal means, and to permit them thereafter to modify their plans to meet the changing needs and continuing best interests of their children. As such it impairs the personal liberties of the parties involved and their children.

A. The contacts between Dr. Kulko and the State of California are so minimal as to clearly offend traditional notions of fair play and substantial justice.

In *Hanson v. Denckla* (1958) 357 U.S. 235, 253, this Court stated:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities

within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. State of Washington,* 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95."

It is hard to envision anyone, who finds himself with sufficient involvement to be served with legal process, who could have less "contacts" than Dr. Kulko had in the instant case. These are set forth in the two affidavits of Ezra Kulko submitted to the trial court (App. 24-31).

Certainly whatever contacts did exist predated the Separation Agreement of September 19, 1972 (App. 8-12) and the Decree of Divorce of September 25, 1972 (App. 13-15), and as such became res judicata as to all issues that were or would have been litigated therein. See *Schoch v. Superior Court* (1970) 11 Cal. App.3d 1200, 90 Cal.Rptr. 365,[4] which denied juris-

[4]In footnote No. 3 at p. 1208, the court stated:
"No opinion is expressed as to whether under the new law (Code Civ. Proc. § 410.10), the facts that a child resided in this state at the time of the dissolution of the family and continues to so reside, and that an agreement was entered into within this state which provided for the support of the child, would furnish such minimum contacts with this state that the maintenance of suit for a future failure to support, either under the terms of the agreement or under changed circumstances, against a nonresident father who is personally served outside of the state would not offend traditional notions of fair play and substantial justice. (See International Shoe Co. v. State of Washington (1945) 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95; 1969 Judicial Council Report to the Governor and the Legislature, pp. 69-84; Am.Law Inst., Restat. of the Law, Second, Proposed Official Draft (1967) Conflict of Laws, §§ 27-39, particularly §§ 36, subd. (2), 37 and 39; Gorfinkel & Lavine, California Long-Arm Jurisdiction (1970) 21 Hastings L.J., 1163, cf. pp. 1173-1178 with pp. 1214-1216; Ehrenzveig & Mills, Personal Service Outside the State (1953) 41 Cal.L.Rev. 383, 392.)"

diction over a nonresident father to increase child support.

Accordingly, the sole basis upon which California can and does assert personal jurisdiction in this case is by an extended interpretation of its long-arm statute, Code of Civil Procedure §410.10, under the recognized basis for jurisdiction "causing an effect in the state by an act done elsewhere." The Supreme Court of California affirmed such jurisdiction upon *the act of a parent permitting his minor child to live in California.*

In reaching its conclusion, the Court took note of its statement made in *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 128 Cal.Rptr. 34, as follows, at page 446:

"notwithstanding this 'effect' the imposition of jurisdiction may be unreasonable."

In this respect, the California Supreme Court in its instant decision acknowledged the following:

"It is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an 'effect' in California could theoretically subject him to *in personam* jurisdiction in California. If this theory of jurisdiction were carried out to its full extremes, it is obvious that it would discourage those outside California from having any contacts or relations with persons living in our state." (J.S. App. A, v.).

It is respectfully submitted that the rationale and potential impact of the Court's decision reaches and

surpasses the outer limits of extending *in personam* jurisdiction, and should not be permitted.

In *Shaffer v. Heitner* (1977) ..... U.S. ....., 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683, 702, this Court stated:

> "when the existence of jurisdiction in a particular forum under *International Shoe* is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice.' The cost is too high."

B. The act of a father in consenting to the request of a child to change parental custody and move to another state should not be construed as a device to achieve in personam jurisdiction.

In the instant case, all of the significant occurrences in which Appellant was a participant took place in the State of New York. When the separation agreement between the parties was executed it contemplated that both children would reside nine months in the custody of the father in New York and three months in the custody of the mother in California (App. 9-10). At that time the obligation for child support was agreed upon. It seems clear that at the execution of the agreement neither party was under the belief that their acts were such as to confer personal jurisdiction over Ezra Kulko in the State of California. However, such is the implication which the California decision achieves, since he acted to confirm custody for part of the year in California at that time.

Accordingly, the question arises as to why, if the parties did not confer personal jurisdiction by California over Dr. Kulko when he executed the agreement in New York providing that Sharon was entitled to both custody and support for three months of the year, it suddenly spontaneously occurs by the much less formal act of consenting to Ilsa's request to expand the period of time with her mother, presumably simply by exchanging time periods, i.e., nine months with Sharon and three months with Ezra, approximately a year later. Certainly under the rationale of the California decision, the parties agreed to avail themselves of the "total panoply of the state's laws, institutions and resources," to the same extent for three months as occurred later, except for a longer duration of time. The only apparent difference being that of their schooling.

It is clear that prior to the holding in the instant case, California's appellate courts had refused to extend *in personam* jurisdiction in family law cases involving similar acts of nonresident parents. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 131 Cal. Rptr. 246; *Titus v. Superior Court* (1972) 23 Cal. App.3d 792, 100 Cal.Rptr. 477; *Schoch v. Superior Court* (1970) 11 Cal.App.3d 1200, 90 Cal.Rptr. 365. Heretofore, the accepted basis for obtaining jurisdiction was that expressed in *Schoch, supra,* as follows, at page 1204:

> "An order for the payment of child support, like an order for the payment of alimony, saddles the father with a financial obligation of a personal nature which, if valid, can be enforced in any state where the defendant may be located. 'This being so, the defendant is entitled to insist

that such a judgment be predicated upon personal service within the state which seeks to impose such obligation. To hold otherwise would be to violate the fundamental requirement of due process, and to give an unwarranted, extra-territorial effect to the judicial process of the issuing state.' (Perry v. Perry (1953) 119 Cal.App.2d 461, 464, 259 P.2d 953, 954. See also Hartford v. Superior Court (1956) 47 Cal.2d 447, 454, 304 P.2d 1; Amparan v. Superior Court (1966) 246 Cal.App. 2d 41, 44, 54 Cal.Rptr. 501; Josephson v. Superior Court (1963) 219 Cal.App.2d 354, 360-361, 33 Cal.Rptr. 196; Turner v. Superior Court (1963) 218 Cal.App.2d 468, 472, 32 Cal.Rptr. 717; and Sharove v. Middelman, supra, 146 Cal.App.2d 199, 202, 303 P.2d 900.)"

It is respectfully submitted that the rationale expressed above is still the appropriate rule of law, and applicable as well in the instant case. The acts of parents in trying to achieve the elusive answers of how, where and with what degree of parental influence children should be raised, is so personal and evolving in nature, as to preclude the use of such acts as a sound basis for procedural due process, in this case *in personam* jurisdiction.

II

THE NATURE OF THE EFFECTS ATTRIBUTABLE TO DR. KULKO'S ACTS AND HIS RELATIONSHIP TO THE STATE OF CALIFORNIA MAKE THE EXERCISE OF PERSONAL JURISDICTION OVER HIM BY THE STATE OF CALIFORNIA UNREASONABLE.

The circumstances adopted by California for assessing the effects within the state by acts done elsewhere are those set forth in the Restatement, to wit:

(1) The act was done with the intention of causing effects in this state;

(2) The act, although not with the intention of causing effects in this state, could reasonably have been expected to do so;

(3) The act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so.

Restatement of Conflict of Laws 2d, §37, Caveat, p. 156.[5]

Appellant submits that only circumstance (3) applies in this case, and as such does not invoke the operation of C.C.P. §410.10. The single acts of Dr. Kulko in consenting to his daughter's wishes to stay with her mother, assisting her to make the change by purchasing a one-way ticket and allowing her to remain and reside during the school year in California is seized upon by the California Supreme Court

[5]A detailed examination and explanation of Code of Civil Procedure Section 410.10, and in particular the California Judicial Council's comments concerning base No. (9); that is, "Causing Effect in State by Act or Omission Elsewhere," appears in *Quattrone v. Superior Court* (1975) 44 Cal.App.3d 296, 302 et seq., 118 Cal.Rptr. 548.

as an indication that Dr. Kulko "purposely availed himself" of the benefit and protection of California's laws. In addition, the Court found that he achieved an economic benefit by being no longer liable for the child's support.

Appellant respectfully challenges the rationale of these conclusions. *First,* it is clearly a fiction to assert that Dr. Kulko by his acts intended to invoke the benefit and protection of any laws in California. On the contrary, the facts set forth in Dr. Kulko's Affidavit, paragraphs 6 through 9 (App. 29-30) indicate that he was most unhappy over the desire of either or both children to change residence and custodial parents. Under such circumstances, with his former wife already a resident of California, there were few, if any, alternatives available to him. Certainly, he was not aware, nor had he reason to believe, that by accepting the realities of his children's desires he was conferring *in personam* jurisdiction to a state 3,000 miles distant. Our contemporary views of "fair play and substantial justice" would at a minimum entitle the acting party to some awareness of the legal and financial consequence of his alternative choices. The absence of this knowledge constitutes a violation of the long established constitutional requirement of "fair notice." Other options available to him were the following:

a. Denial of his daughter's request,

b. Invoking legal proceedings in New York,

c. Opening up new negotiations for a modified agreement before agreeing to any change.

Each of the above would have provoked an emotional response, re-opened hostilities, and induced further legal action.

Instead, Dr. Kulko accepted the alternative least likely to strain the already difficult relationships between the various members of the family. It is certainly a reasonable conclusion that the choice of greatest cooperation which would best preserve family harmony, and which might lead to a change of heart and/or mind by either or both children to return to the father at a later time, was an appropriate parental solution at the time.

The assertion that Appellant achieved an economic benefit is inappropriate, if even factually accurate. It goes to the very heart of why parents have children at all, or desire their custody. Obviously the costs invoked are always a secondary consideration. It is of the same degree as telling the parents in a child wrongful-death case of their economic savings. In any case, the obligation of Appellant to support his children would seem to be potentially the same whether he paid such costs directly or indirectly through child support. Presumably, this obligation would exist if presented to the courts of New York as well as California.

The same reasoning that challenges the inference that Dr. Kulko's acts were of an intentional type, applies equally to the concept of reasonable expectation of causing effects. Both suggest a process of objective thought and planning. Unfortunately, such objectivity is the exception rather than the norm in family law disputes.

It is respectfully submitted that the California Supreme Court was involved in selective distinctions when it found that neither the cases of *Titus v. Superior Court* (1972) 23 Cal.App.3d 792, 100 Cal.Rptr. 477 nor *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 131 Cal.Rptr. 246, which both held it unreasonable to impose personal jurisdiction, were applicable to the instant case. In *Titus,* the children were originally sent to California for visits and kept there. This almost occurred in the instant case. Instead, Ilsa was returned and then asked to remain with the mother, a month later.

In *Judd, supra,* an agreement permitted the children to live with the mother, who then moved to California, apparently with the knowledge and consent of the father, where the father thereafter visited the children and paid support for them. In both cases, the father was relieved of the obligation to care for the children himself, and in both he consented or at least made no objection *at a later time* to permitting the children to live in California. It is submitted that the strong public policy encouraging support and communication between a natural father and his children, without discouraging the father from the expense and inconvenience of relitigating support in California, applied in these cases, should apply as well in this case and all similar family law disputes. This was precisely the solution invited by Appellant in his letter to Real Party in Interest (App. 44). In addition, the act of a parent in permitting a child to take up residence with the other parent in a distant state, should not be construed as a type of general

appearance by the nonresident for future legal proceedings in the distant state.

It is submitted that the acts of Dr. Kulko in conceding to the wishes of his children and in effect accepting an implied modification of the marital agreement as to custody, are less intentional than those of the parent in the first instance who agrees in a marital agreement to allow the children to come to live in California with the other parent. The instant decision would logically have the legal effect of causing nonresident settlement agreements to constitute intentional acts establishing *in personam* jurisdiction over a nonresident parent.

III

A BALANCING OF BURDENS BETWEEN THE NONRESIDENT, DR. KULKO, AND THE RESIDENT, MRS. HORN, WEIGHS HEAVILY AGAINST ESTABLISHING PERSONAL JURISDICTION OVER DR. KULKO.

In *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 128 Cal.Rptr. 34, and *Buckeye Boiler Co. v. Superior Court* (1969) 71 Cal.2d 893, 80 Cal.Rptr. 113, the California Supreme Court recognized the need for an additional inquiry on the question of fairness and reasonableness, notwithstanding the finding of "effect". In particular, the court stated in *Buckeye Boiler* at page 899:

> "Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity,

the propriety of an assumption of jurisdiction depends upon a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction. (McGee v. International Life Ins. Co., *supra,* 355 U.S. 220, 223, 78 S.Ct. 199; Fisher Governor Co. v. Superior Court, *supra,* 53 Cal.2d 222, 225, 226, 1 Cal. Rptr. 1, 347 P.2d 1.) In other words, once the threshold of sufficient activity by the defendant has been passed, the question of the propriety of subjecting the defendant to the jurisdiction of the forum involves both a consideration of fairness to the plaintiff (see Phillips v. Anchor Hocking Glass Corporation (1966) 100 Ariz. 251, 413 P.2d 732, 19 A.L.R.3d 1, 7) and a determination of whether, from a standpoint of the logical and orderly distribution of interstate litigation, the forum state is what Professor Ehrenzweig has termed a 'forum conveniens.' (See Ehrenzweig, The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens (1956) 65 Yale L.J. 289, 312; see generally, von Mehren and Trautman, Jurisdiction to Adjudicate; a Suggested Analysis (1966) 79 Harv.L.Rev. 1121.)"

A. Potential detriment to Ezra Kulko.

1. Litigation costs and inconvenience of traveling 3,000 miles to protect his interest;

2. Risk of future and repeated hearings;

3. Hardships arising from obligation to conform to local rules, standards, and attitudes, which differ from those where he is domiciled;

4. Possibility of having to change jurisdiction as the child moves about;

5. Possible criminal sanctions imposed for failure to comply with child support orders imposed in his absence;

6. Loss of benefits of bargain made in marital agreement; i.e., the substantial right to have the children with him, and concessions made therefor; and,

7. Costs involved in visiting with children.

B. Potential detriment to Sharon Horn.

1. Risk that State of New York would be more protective of Ezra's contractual rights;

2. Risk that State of New York would apply different support standards than California;

3. Inconvenience and lack of personal contact arising from need to invoke Uniform Reciprocal Support Act proceedings; and,

4. Costs and inconvenience of making a personal appearance in New York, if required.

C. Potential detriment to public.

1. Traditionally, family law decisions permit the custodial parent to leave the initial jurisdiction upon showing good cause. Consent by non-custodial parent would now confer personal jurisdiction in the state of their destination.

2. Possibility that if consent to custody in a distant state would confer *in personam* jurisdiction for child support, the custodial parent and/or children

would be likely to forum shop for their best interests; i.e., choosing a state where child support extends to the age of twenty-one years, and/or includes college education.

3. Raises an artificial distinction between parents consenting to change custody after a settlement and those where consent is given at the time of divorce. (This is the distinction between *Kulko* and the cases of *Judd* and *Schoch, supra.)*

IV

THE INSTANT DECISION EFFECTS A MERGER OF TRADITIONAL DISTINCTIONS BETWEEN JURISDICTION TO DETERMINE CUSTODY AND THAT REQUIRED FOR CHILD SUPPORT.

The distinctions in the established criteria required to establish jurisdiction between custody cases and child support are set forth at length in *Titus v. Superior Court, supra.* This distinction was the basis for the denial of jurisdiction in *Schoch v. Superior Court, supra.*

It is submitted that extending *in personam* jurisdiction into family law cases based upon consent to place of residence opens the door to an elimination of these traditional distinctions in family law proceedings, and as such materially and detrimentally affects the orderly resolution of marital breakup, custody, and child support between the parents and without recourse to the Courts.

Certainly a significant legal impact will take place if the consent of a parent to one child, as was given by Dr. Kulko to his daughter, Ilsa, extends by operation of law to other children as well, as occurred in the case of Darwin. By inference, when families agree on a split custody arrangement between their children, as in this case, a subsequent, non-consentual change by a child will carry with it the personal jurisdiction achieved by the initial act of consent over an objecting parent in a distant state. The result could only lead to withholding consent in the first instance, even if its granting were desirable.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the California Supreme Court be reversed, and that this Court should issue its writ of mandate vacating the order of denial and entering its order granting petitioner's motion to quash service of summons for lack of personal jurisdiction.

LAWRENCE H. STOTTER,
Counsel for Appellant.

Of Counsel:
EDWARD SCHAEFFER.

January 26, 1978.

(Appendix Follows)

APPENDIX

Appendix

Superior Court of the State of California
for the City and County of San Francisco

No. 701 626

In re the marriage of
Petitioner: Sharon Kulko Horn
and
Respondent: Ezra Kulko

[Filed Sept. 8, 1977]

ORDER INCREASING CHILD SUPPORT, DETERMINING ARREARAGES, AND FOR ATTORNEY FEES ON ACCOUNT

This matter came on for hearing on August 30, 1977, petitioner being personally present and represented in court by her attorneys, Schapiro and Thorn, Inc. by Suzie S. Thorn, and respondent not being personally present but represented in court by his attorneys, Stern, Stotter and O'Brien by Lawrence H. Stotter who made a special appearance only to contest the jurisdiction of the Court, and evidence having been introduced and good cause appearing therefor, the Court finds as follows:

1. The Court has jurisdiction to make child support and other orders in this matter.

2. Petitioner needs, and respondent has the ability to pay, reasonable sums for the support of each minor child.

3. Respondent owed, under the agreement of the parties, $9,000.00 child support for 1973, 1974 and 1975. Respondent paid during that period $2,000.00 in child support, and there is due, owing and unpaid for said period $7,000.00.

4. Respondent owed for child support for 1976 the sum of $6,000.00, and paid nothing during said period.

5. Respondent owed for child support for the period 1/1/77 thru 8/31/77 the sum of $4,800.00 child support and paid nothing for said period.

6. Petitioner has incurred substantial legal expenses in the prosecution of this case, and respondent has the ability to pay reasonable sums for attorney fees and litigation costs.

Now, Therefore, It Is Ordered:

1. Respondent's motion to continue this hearing pending an appeal to the U.S. Supreme Court is denied.

2. Respondent shall pay to petitioner for the support of each minor child the sum of $300.00 per month, a total of $600.00 per month, commencing March 1, 1976 and continuing on the 1st of each month until further order of court.

3. As and for additional child support, respondent shall pay one-half the private school tuition for each child, commencing with the 1977-78 school year and

continuing so long as said child attends private school, or until further order of court.

4. Respondent is in arrears in payments of child support in the total sum of $17,800.00 and respondent shall pay said sum forthwith to petitioner.

5. The determination of respondent's arrearage in payments for clothing and medical expenses for the children is deferred to further hearing herein.

6. Respondent shall pay to Schapiro and Thorn, Inc., petitioner's attorneys, the sum of $7,500.00 on account of attorney fees and litigation costs without prejudice to the future determination of the actual and reasonable amount of attorney fees and litigation costs in this matter.

Dated: Sept. 8, 1977

/s/ Donald B. King
Donald B. King
Judge of the Superior Court